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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DAYCO FUNDING CORPORATION, Plaintiff and Respondent, v. HENRY DANPOUR, Defendant and Appellant.	B278055 (Los Angeles County Super. Ct. No. BC476328)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick C. Shaller, Judge. Affirmed in part and dismissed in part.

Eanet, PC, Matthew L. Eanet and Laine Mervis, for Defendant and Appellant.

Frandzel Robins Bloom & Csato, Andrew K. Alper and Hal D. Goldflam, for Plaintiff and Respondent.

Respondent Dayco Funding Corporation filed a breach of contract action seeking to enforce a commercial loan guaranty against appellant Henry Danpour and Menashi Cohen. Cohen settled with Dayco, and obtained a determination of good faith settlement pursuant to Code of Civil Procedure section 877.6. Dayco then filed a motion for summary judgment against Danpour seeking the amount due under the loan agreement. The trial court granted the motion, and entered judgment in Dayco's favor.

Following entry of judgment, Danpour filed a motion for new trial arguing that the debt calculations set forth in Dayco's motion for summary judgment included several errors that resulted in an excessive damages award. The court denied the motion.

Danpour's appeal challenges the order granting summary judgment, the order denying his motion for new trial and the order determining that Cohen and Dayco's settlement was made in good faith. We affirm the judgment, concluding that Danpour has failed to establish any error with respect to the summary judgment or new trial orders. We dismiss Danpour's challenge to the good faith settlement order because he failed to provide any notice to Cohen, a signatory to the settlement agreement, that he was seeking review of the order.

FACTUAL BACKGROUND

A. Avenue K's Lending Agreement and Default

Appellant Henry Danpour and Menashi Cohen co-owned a business entity known as "Avenue K." In December 2006, Union Bank (then Union Bank of California) loaned Avenue K the principal sum of $2,999,000, which was secured by a deed of trust

to real property located in Lancaster, California (hereafter the Lancaster property).

A written promissory note setting forth the terms of the loan provided a variable interest rate with a minimum "Floor Rate" of 7.125 percent. The note required Avenue K to make monthly payments of $20,204 from February 1, 2007 through January 1, 2017. The amount of Avenue K's monthly payment was to be recalculated on February 1, 2017, and every three months thereafter until the maturity date of January 1, 2037.

The note included several provisions that subjected Avenue K to increased interest and charges in the event of late payments or a default, including: (1) an additional 5 percent interest in the event of default (default interest); (2) a 6 percent late payment fee for any late monthly payment (late payment charge); and (3) a fee equal to 1 percent of the remaining principal if the lender elected to accelerate the debt due to a default (acceleration charge).

Danpour and Cohen jointly executed a guaranty that obligated each of them to pay all sums due under the terms of the note. In September 2010, Dayco acquired the Avenue K loan from Union Bank through an online auction. At that time, Avenue K was still current on its loan payments.

Avenue K continued to make full and timely monthly payments through June 2011. Between July and November 2011, however, Avenue K made several late payments that were less than the required amount of $20,204. Beginning in December of 2011, Avenue K stopped making payments.

On December 28, 2011, Dayco sent a letter notifying Avenue K that it was accelerating the debt, and demanding full

repayment of all sums due under the note, which then totaled approximately $3,000,000.

B. The Filing of the Complaint and Initial Stages of the Litigation

On January 5, 2012, Dayco filed a complaint alleging a single cause of action against Danpour and Cohen for breach of the loan guaranty. Danpour filed a verified answer to the complaint that contained no affirmative defenses.

In April 2012, Dayco, Danpour and Cohen signed a forbearance agreement stating that Dayco would accept a payment of $2,8500,000 to fully satisfy the loan, the balance of which Dayco then alleged to be approximately $3,100,000. The agreement required the payment to be received on or before June 27, 2012 (90 days after the agreement was signed), and included an integration clause confirming the parties had no other agreements pertaining to the repayment of the note. Danpour and Cohen were unable to secure financing prior to the agreement's expiration date.

In October 2012, Dayco served its first set of requests for admissions (RFAs). Danpour and Cohen provided verified responses admitting Dayco was entitled to each of the following: (1) "the principal sum of $2,851,133.28 through the date of December 28, 2011, together with interest thereon in the sum of $119,809.16. . . , and accruing thereafter at the rate of $960.28"[1]; (2) "interest on the sums loaned . . . at the rates set forth in [the promissory note]"; (3) "late charges for each payment made as allowed by the terms of [the promissory note]"; (4) "late

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1 The daily interest rate of $960.28 reflected a total rate of 12.125 percent, which included the minimum variable rate of 7.125 percent, plus the 5 percent default rate.

charges on each payment on the [promissory note] . . . not made when due through December 28, 2011 in the sum of $7,273.74"; (5) "[an acceleration charge] pursuant to the terms of the [promissory note] . . . in the sum of $28,511.33." Defendants also admitted they had "no defenses for liability to Dayco as alleged in the Complaint." After receiving the responses to the RFAs, Dayco filed a motion for summary judgment, with a hearing date scheduled in April 2013.

Prior to the hearing date, Danpour and Cohen obtained a stay of the summary judgment motion, and permission to file a cross-complaint. The first amended cross-complaint alleged several fraud-based claims involving the Avenue K loan and a second loan Dayco had made to a Cohen-related entity named Crosspoint, which Cohen had also guaranteed (the Crosspoint loan). Dayco had foreclosed on the Crosspoint loan in April 2012, resulting in a deficiency balance due from Cohen in excess of $3,000,000.

The factual allegations pleaded in support of the cross-claims asserted that Dayco had fraudulently induced Cohen to provide his and Danpour's confidential financial information by offering him a second mortgage loan on the Avenue K property. The cross-complaint further alleged that Dayco never intended to provide any such loan, but rather had made the offer solely to obtain Danpour and Cohen's financial information, which Dayco then relied on when deciding to acquire the Avenue K loan from Union Bank. Danpour and Cohen also alleged Dayco had made an oral promise that it would not enforce the 90-day expiration term set forth in the forbearance agreement, and that they could tender the $2,850,000 payment at any time. According to the cross-complaint, Dayco elected to enforce the forbearance

agreement's expiration date after learning that Danpour had found a lender willing to finance the payment. The cross-complaint also included a series of claims related to the Crosspoint loan, alleging that Dayco had engaged in various forms of misconduct with the intent to cause Crosspoint to default on its loan.

In March 2013, Dayco initiated a nonjudicial foreclosure of the Lancaster property that secured the Avenue K loan. In April 2014, Dayco purchased the property at a trustee's sale for a $1,850,000 credit against the Avenue K loan debt.

C. Cohen's Settlement with Dayco

In 2014, Cohen entered into a settlement agreement that required him make a $250,000 payment to Dayco in January 2018. During the intervening three-year period, Cohen was to pay Dayco monthly interest payments on the principal settlement sum. The settlement further provided that Cohen agreed to dismiss all of the claims he had alleged in the cross-complaint, and that Dayco agreed to dismiss all claims against him related to the Avenue K loan and the Crosspoint loan.

The settlement contained a provision allocating the full amount of Cohen's $250,000 payment to the remaining debt on the Crosspoint loan. The settlement also included a series of admissions by Cohen in which he asserted that he had no knowledge of any oral forbearance agreement regarding the Avenue K loan, and denied that Dayco had ever requested he provide any financial information regarding himself or Danpour. Cohen also denied various allegations set forth in the cross-complaint regarding the Crosspoint loan.

Cohen and Dayco filed a motion for determination of good faith settlement pursuant to Code of Civil Procedure section

877.6[2] that summarized the terms of their agreement. Although Cohen provided the court with a copy of the settlement agreement, his motion did not otherwise disclose that the parties had fully allocated Cohen's settlement payment to the remaining debt on the Crosspoint loan.

Danpour contested the request for a determination of good faith settlement, arguing that the settlement figure of $250,000 was grossly disproportionate to Cohen's 50 percent share of the liability on the Avenue K loan, which exceeded $2 million even after the foreclosure sale. Danpour further asserted that, at a minimum, the court should permit him to conduct discovery regarding Cohen's financial condition. Danpour did not contest allocation. The court permitted Danpour to conduct the requested discovery, and to file a supplemental motion contesting the settlement.

On January 7, 2015, the court issued an order determining the settlement was made in good faith. The court found that the settlement amount of $250,000 represented "only about 12%" of the remaining debt on the Avenue K loan, which would effectively increase Danpour's "proportional liability from 50% to 88%." The court further found, however, that Cohen had submitted evidence showing he had had no insurance, and that his current net worth was "negative 6.984 million . . . due to defaults and subsequent foreclosures on real property owned by Cohen and his entities."

The court concluded that Cohen's current financial condition "argue[d] in favor of a settlement of much less than the proportionate share of the joint liability with Danpour." The court also noted that while Danpour's right of contribution would

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[2] Unless otherwise noted, all further statutory references and citations are to the Code of Civil Procedure.

be "cut off by a finding of good faith, it is likely at this juncture that due to the financial condition of Cohen that any such theoretical order of indemnification or contribution would be uncollectable."

D. Dayco's Motion for Summary Judgment

1. Summary of the parties' briefing

a. Dayco's motion

On April 1, 2015, Dayco filed a supplemental complaint against Danpour for breach of the loan guaranty that contained a recalculation of the amount currently due on the Avenue K loan. Danpour filed an answer to the supplemental complaint that alleged seven affirmative defenses. None of the defenses alleged that any provision in the lending agreement constituted an unlawful liquidated damages provision.[3]

On April 6, 2016, Dayco filed and served a new motion for summary judgment against Danpour seeking payment of $2,571,403, the amount Dayco claimed was currently due under the Avenue K loan. Alternatively, Dayco sought summary adjudication of each of the seven affirmative defenses alleged in Danpour's answer.

Dayco argued it was entitled to summary judgment because the undisputed evidence conclusively established Danpour had breached the guaranty by failing to pay the amounts due under the Avenue K loan. The motion included a detailed calculation

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[3] In addition to the supplemental complaint, Dayco filed a series of demurrers to Danpour's cross-complaint. After permitting several amendments to the pleading, the trial court sustained Dayco's demurrer to the third amended cross-complaint without leave to amend. Danpour has not challenged that ruling in this appeal.

explaining how Dayco had arrived at the current debt amount of $2,571,403. The calculation included the remaining principal on the loan, non-default and default interest, monthly late charges, the acceleration charge and costs associated with the trustee's sale. The calculation also credited Danpour $1,850,000 for the amount Dayco had paid at the foreclosure sale of the Lancaster property, and credited various other partial payments Avenue K had made since July 2011. Dayco's president, Sean Dayani, provided a declaration supporting the calculation.

The motion also argued there were no triable issues with respect to any of the affirmative defenses, including the defense of unclean hands.[4] The motion asserted that Danpour's unclean hands defense was predicated on Dayco's alleged breach of an oral promise not to enforce the expiration date in the forbearance agreement, and unlawfully inducing Cohen to provide his and Danpour's personal financial information. Dayco argued that the admissions Cohen had made in the settlement agreement, which denied the existence of any oral promise regarding the forbearance agreement and denied that Dayco had ever requested his or Danpour's personal financial information, disproved these allegations.

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[4] As explained in more detail below, although the court found there were no triable issues regarding any of the seven affirmative defenses Danpour had alleged in his answer, Danpour's appeal only challenges the court's finding regarding the defense of unclean hands. Accordingly, we will not address the parties' arguments or analysis pertaining to the other six defenses.

b. Danpour's opposition

In his opposition, Danpour asserted the motion for summary judgment should be denied because there were disputed factual issues whether the loan agreement's provisions pertaining to default interest, late payment charges and the acceleration charge constituted unenforceable liquidated damages under Civil Code section 1671, subdivision (b). Danpour's opposition asserted, without citation to evidence or legal authority, that each of these provisions was "unconscionably punitive in character and not reasonably calculated to merely compensate the lender."

Danpour also argued there were triable issues regarding his unclean hands defense. He contended that the evidence filed in support of the opposition, which consisted solely of his own declaration, showed that Dayco had caused Avenue K to default on its loan by withholding "full payments on a separate construction loan between [Dayco] and Cohen." Danpour acknowledged he was "not involved in those other projects," but claimed that the "the desired effect was to cause Cohen to falter on his obligation to service the Avenue K mortgage, and eventually cause [Avenue K] to go into default." Danpour further alleged that Dayani (Dayco's president) had made representations to him and Cohen that no legal action would be taken against them regarding the guaranty, and that Dayco would give them "as much time as they needed to tender the payoff amount" set forth in the forbearance agreement.

The declaration Danpour filed in support of his opposition asserted that in 2008, Cohen had told him he intended to obtain financing from Dayco to acquire Danpour's ownership interest in Avenue K. The declaration further asserted that Cohen told

Danpour Dayani had asked Cohen to submit his and Danpour's "personal financial information." Danpour alleged that he then gave his personal financial information to Cohen, who later "advised" Danpour that the information had been "taken for review to Sean Dayani."

Danpour's declaration further asserted that around this same time, he became aware that "the other development project in which [Cohen] was involved with [Dayco], was receiving short funding, . . . missed lender payments, and was at risk of shutdown due to the inconsistent financial support." Danpour then discovered Cohen had "beg[u]n to miss . . . payments " on the Avenue K loan. However, Cohen "assure[d]" him that Dayani had "promised" Dayco would not enforce the Avenue K loan guarantees. Dayani then allegedly met with Danpour, and told him directly that Dayco would not enforce the guaranty, that Dayco would accept $2,850,000 in complete satisfaction of the Avenue K loan and that Danpour could have as much time as he needed to make that payment.

c. Dayco's reply brief

In its reply brief, Dayco argued that Danpour's contention that various provisions in the loan were unenforceable under Civil Code section 1671 conflicted with his responses to Dayco's request for admissions, which had admitted that all of the provisions in the loan were valid. Dayco further asserted that Danpour had failed to submit any "admissible evidence" supporting his unclean hands defense. According to Dayco, Danpour's entire declaration was either hearsay or conflicted with his verified discovery responses. Dayco also filed evidentiary objections seeking the exclusion of almost every statement in Danpour's declaration.

2. The trial court's ruling

After a hearing, the court entered an order granting Dayco's motion for summary judgment. The court explained that under Civil Code section 1671, subdivision (b), a liquidated damages provision in a commercial loan is deemed valid unless the challenging party establishes that the provision was unreasonable at the time the contract was entered into. The court provided three reasons why Danpour had failed to show there was any triable issue regarding the reasonableness of the contested loan provisions.

First, none of the answers Danpour had filed during the proceedings contained "any affirmative defense indicating that any portion of the contract was an unenforceable penalty or that the provision was unreasonable under the circumstances existing at the time the contract was made." The defense was therefore "precluded."

Second, the court explained that Danpour's prior discovery responses had admitted Dayco was "entitled to the now challenged" default interest, late payment charges and the acceleration charge. The court concluded these admissions constituted a "waive[r] [of] the [liquidated damages] argument."

Third, and finally, the court found that even if Danpour had not waived the section 1671 defense, he had failed to submit any "supporting facts" showing that the challenged contract provisions were "unreasonable under the circumstances existing at the time the contract was made."

On the issue of unclean hands, the court found Dayco had presented evidence showing that Cohen did not provide Dayco with Danpour's personal and confidential financial information, and that Dayco had not made any oral promise regarding the

forbearance agreement. The court further found that Danpour had provided no "admissible evidence to the contrary," and sustained all of Dayco's objections to Danpour's declaration.[5]

On July 27, 2016, the court entered a judgment awarding Dayco $2,571,408, the same amount Dayco had sought in its motion.

E. Danpour's Motion for New Trial

Following entry of judgment, Danpour filed a motion for new trial arguing that the amount of damages awarded in the judgment was excessive. The motion asserted that after the judgment had been entered, Danpour's attorney became aware "that the calculations used by [Dayco in the motion for summary judgment] . . . overstate[d]" the total amount that was actually due under the loan. Danpour identified several alleged errors in the calculation. First, he asserted that Dayco had calculated default interest based on the date of the first incident of default, rather than on the date Dayco had actually declared the default, a difference of almost 200 days. Danpour contended that under the terms of the loan, "default interest [should not] begin to accrue until the default was declared," and that Dayco's calculation had resulted in $72,466 in excessive interest.

Second, Danpour argued that Dayco's calculation had improperly included "monthly late charges" for the period after Dayco had accelerated the debt. According to Danpour, the monthly late charges were "terminat[ed]" by the acceleration demand, and thereafter "replaced by the Default Interest Rate in

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5 As discussed in more detail below (see *post* at pp. 19-20), Danpour has forfeited any challenge to the trial court's evidentiary rulings.

lieu of the monthly late fee, resulting in a double charge penalty" that amounted to $29,049.

Third, Danpour asserted that Dayco's calculation included a "claimed Interest Shortage" that effectively "double counted" interest that was "already part of the calculation . . ., resulting in an excess award amount of $38,024."

Finally, Dayco alleged that under section 877, he was entitled to a $250,000 offset against the judgment based on Cohen's settlement with Dayco.

Dayco opposed the motion for new trial, asserting that Danpour could have and should have raised each of these issues during the summary judgment proceedings. Dayco explained that all of the calculations Danpour was now challenging were set forth in the motion for summary judgment and in Dayani's supporting declaration. Danpour, however, had not challenged any of the calculations in his opposition, nor had he objected to the portion of Dayani's declaration "which sets forth all grounds for the amounts due. . . ."

On the issue of offset, Dayco additionally argued there was no basis to reduce the judgment because the settlement agreement allocated Cohen's $250,000 payment "to [Cohen's] obligation due on the Crosspoint [loan], not to the obligation of Avenue K which Danpour had guarantied." Dayco further argued that even if Danpour was entitled to an offset, the settlement did not require Cohen to pay the $250,000 until January 2018.

At the hearing on the motion for new trial, Dayco emphasized that Danpour had an opportunity to raise all of the alleged calculation errors identified in the motion for new trial during the summary judgment proceedings. In response to this argument, Danpour's counsel explained that he had not

addressed any of the alleged miscalculations at that time because he believed "that would be something [the parties] could . . . address[] at a future date."

Following the hearing, the court entered an order denying the motion for new trial. The order explained that the damages calculations Dayco was now challenging were "set forth in the evidence supporting the [motion for summary judgment]." Danpour, however, had not challenged those calculations in his opposition to the motion, nor had he provided the court with "any [alternative] damage calculation. Thus[,] although Danpour's counsel claims to have been surprised at the actual damages amount after re-calculating the damages the opportunity for this information was when the motion was to be opposed, not when the judgment is already entered."[6]

With respect to Danpour's request for a settlement offset, the court concluded it would be inappropriate to provide any offset unless and until Cohen actually paid the settlement to Dayco, which was not scheduled to occur for several more years. The court further explained that if the $250,000 principal payment was made in the future, Danpour could seek an order of partial satisfaction of judgment.

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[6] The court likewise found there was no basis to provide relief from the judgment under section 473, subdivision (b) because there was no justification or excuse for having failed to raise the alleged calculation errors during the summary judgment proceedings.

DISCUSSION

A. Danpour Has Failed to Establish the Existence of Any Triable Issue of Fact

Danpour argues the trial court erred in granting Dayco's motion for summary judgment because there are triable issues of fact regarding two issues: (1) whether various provisions in the loan agreement are invalid under Civil Code section 1671; and (2) whether Dayco's claim is precluded under the defense of unclean hands.

1. Standard of review

A motion for summary judgment may be granted only when no "triable issue of one or more material facts" remains for trial. (§ 437c, subd. (o) (1) & (2).) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' [Citation.]" (*Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, 643.)

"We review an order granting or denying summary adjudication de novo. [Citation.] In our review, we 'liberally construe[] the evidence in support of the party opposing summary judgment and resolv[e] doubts concerning the evidence in favor of that party. [Citation.]' [Citation.]" (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1233.)

2. Danpour produced no evidence that would support a finding of unenforceability under Civil Code section 1671

Danpour argues the court erred in finding there is no triable issue of fact whether the loan agreement's default

interest, late payment charge and acceleration charge provisions are invalid under Civil Code section 1671, subdivision (b).

"Subdivision (b) of Civil Code section 1671 states a presumption of validity of a liquidated damages clause, and places the burden on the party who seeks invalidation to show that '. . . the provision was unreasonable under the circumstances existing at the time the contract was made.'"[7] (*Weber, Lipshie & Co. v. Christian* (1997) 52 Cal.App.4th 645, 654.) The Law Revision Commission's comments to section 1671 explain that "'subdivision (b) gives the parties considerable leeway in determining the damages for breach. All the circumstances existing at the time of the making of the contract are considered, including the relationship that the damages provided in the contract bear to the range of harm that reasonably could be anticipated at the time of the making of the contract. Other relevant considerations in the determination of whether the amount of liquidated damages is so high or so low as to be unreasonable include, but are not limited to, such matters as the relative equality of the bargaining power of the parties, whether the parties were represented by lawyers at the time the contract was made, the anticipation of the parties that proof of actual damages would be costly or inconvenient, the difficulty of proving causation and foreseeability, and whether the liquidated damages provision is included in a form contract." (*Id*. at pp.

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[7] Section 1671, subdivision (b) states: "[A] provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made."

654-655 [quoting and citing Cal. Law Revision Com. com., 9 West's Ann. Civ. Code (1985 ed.) § 1671, p. 498].)

As the trial court recognized, Danpour's opposition failed to cite any evidence in support of his assertion that the challenged loan provisions were unreasonable at the time the loan agreement was entered. Instead, his opposition merely related the amount that Dayco claimed due under each of the challenged loan provisions, and asserted, without citation to any evidence or legal authority, that "such charges are and were at the time signed . . . unconscionably punitive in character and not reasonably calculated to merely compensate the lender. The motion for summary judgment should be denied on this basis."

This conclusory assertion is insufficient to establish a triable issue of fact concerning the enforceability of the challenged loan provisions. Danpour has provided no evidence regarding the reasonableness of these provisions at the time the loan agreement was entered, nor has he cited any authority supporting the proposition that these provisions were unreasonable as a matter of law.[8]

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[8] As summarized above, the trial court's order granting summary judgment also concluded Danpour was barred from asserting Civil Code section 1671 as a defense because: (1) he never pleaded section 1671 as an affirmative defense in his pleadings, and had raised the issue for the first time in his opposition to the motion for summary judgment; and (2) Danpour's assertion of unenforceability under section 1671 conflicted with his prior discovery responses, which admitted he had no defenses to the challenged provisions. Because we agree with the trial court's conclusion that Danpour provided no evidence that would support a finding of unenforceability under

3. Danpour has failed to demonstrate a triable issue of fact on the defense of unclean hands

Danpour also argues the trial court erred in finding there is no triable issue of fact regarding the defense of unclean hands. In his opposition to the motion for summary judgment, Danpour asserted that he had provided evidence showing Dayco induced Cohen to default on the Avenue K loan by withholding payments it owed to Cohen regarding a separate business loan. Danpour further asserted his evidence showed that Dayco had made an oral promise not to enforce the 90-day expiration period set forth in the parties' forbearance agreement, and made a separate oral promise not to enforce the guaranty. Danpour contended that evidence was sufficient to support a finding of unclean hands.

The sole evidence Danpour cited in support of these arguments was his declaration in support of his opposition. The trial court, however, sustained evidentiary objections to virtually the entire declaration, and concluded Danpour had provided no admissible evidence in support of the unclean hands defense.

In his opening appellate brief, Danpour again summarizes the statements set forth in his declaration, and reasserts that the statements are sufficient to support a finding of unclean hands. Although he acknowledges that the trial court's evidentiary rulings "wiped out almost all of [his] testimony," he contends that Dayco's "objections should not have been sustained." Danpour's brief does not explain the nature of the error, nor does he cite any legal authority in support of his assertion of error. Moreover, his brief contains no legal analysis explaining why the statements in his declaration, even if admissible, would be sufficient to support

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section 1671, subdivision (b), we need not review these alternative bases for the court's ruling.

a finding of the defense of unclean hands. Indeed, the entire section of his brief addressing the issue of unclean hands does not include a single citation to any legal authority.

"Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573; see also *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) An appellant has the burden of overcoming this presumption by "affirmatively demonstrat[ing] error through reasoned argument, citation to the appellate record, and discussion of legal authority." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685; see also *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141*; Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 80.) """"When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.'" [Citation.] "We are not bound to develop appellants' arguments for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.'" [Citation.]" (*Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1322, fn. 5.)

Danpour's mere recitation of the statements in his declaration, and his conclusory assertion that such statements were improperly excluded and are sufficient to support a finding of unclean hands, does not constitute proper legal argument. Danpour has thus waived his contentions regarding the defense of unclean hands.

B. The Trial Court Did Not Abuse its Discretion in Denying the Motion for New Trial

Danpour argues the trial court erred in denying his motion for new trial, which sought a reduction in the judgment based on several alleged "err[ors] in the calculation of damages items under the loan." "The trial court is accorded . . . wide discretion in ruling on a motion for a new trial[.] [Citation.] '" . . . [I]ts action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.'" [Citation.]" (*Price v. Giles* (1987) 196 Cal.App.3d 1469, 1472.)

Danpour's motion for new trial asserted that the calculations set forth in Dayco's motion for summary judgment (and in Dayani's supporting declaration) contained various errors regarding the amount of interest and late charges that were due under the loan, resulting in an excessive damages award. The motion additionally requested that the court reduce the judgment amount by $250,000 to offset the amount of Cohen had agreed to pay Dayco in their settlement agreement.

The trial court denied the motion, and declined to reduce the judgment, because Danpour failed to raised these alleged calculation errors in his opposition to the summary judgment motion, but waited to raise the issues for the first time in the motion for new trial. During the motion hearing, the sole justification Danpour's counsel provided for having failed to raise these issues at the summary judgment stage of the proceedings was that he assumed he would have an opportunity to do so after entry of judgment.

We fail to see how the trial court abused its discretion in declining to review issues that Danpour's counsel admitted he could have raised at the summary judgment stage of the proceedings. "[I]t is . . . well established that there is 'no

provision for a new trial on account of mistake of law of a party or his attorney.' [Citation.] '. . . . There have been times no doubt in the experience of every lawyer when he would have liked to have been relieved of a situation brought about by his failure to do the proper thing at the proper time. But after judgment is too late for relief on such ground.' [Citation.]" (*In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 155.) The mere "[f]ailure to think of a legal issue is [generally] not grounds for a new trial." (*McCulloch v. M & C Beauty Colleges, Inc.* (1987) 194 Cal.App.3d 1338, 1347 [rejecting new legal argument raised for "for the first time in its motion for new trial"]; see also *Jacobs v. Retail Clerks Union, Local 1222* (1975) 49 Cal.App.3d 959, 967 [declining to consider argument set forth in a motion for new trial that could have been raised in opposition to the motion for summary judgment, asserting the argument "'was not properly raised in the trial court'"]; 58 Am. Jur. 2d New Trial § 322 ["A motion for new trial is not the appropriate time to raise matters for the first time that could have been raised earlier"].)

While it is true that a trial court has authority to address some types of claims for the first time by way of a motion for new trial, particularly those "present[ing] a question of law to be applied to undisputed facts" (see *Hoffman-Haag v. Transamerica Ins. Co.* (1991) 1 Cal.App.4th 10, 14), we are unaware of any authority holding that a trial must address arguments raised in a motion for new trial when, as here, the moving party acknowledged the argument could have been raised earlier, and identified no justification for his failure to do so.[9]

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[9] Danpour's motion for new trial also sought a $250,000 reduction in the judgment to offset the amount of Cohen's

C. Danpour's Challenge to the Good Faith Settlement Order Is Dismissed

Finally, Danpour argues we must reverse the trial court's order determining that the settlement between Cohen and Dayco was made in good faith (see §§ 877, 877.6) because the order is predicated on an erroneous factual finding. Specifically, Danpour contends that the trial court erroneously assumed the settling parties had allocated Cohen's $250,000 payment toward the Avenue K loan debt, when in fact the settlement agreement allocates that entire sum toward repayment of the "Crosspoint loan," a lending agreement to which Danpour was not a party.

After Danpour filed his opening appellate brief, Dayco filed a motion to dismiss the portion of the appeal challenging the good faith settlement order because Danpour failed to notify Cohen that he was seeking review of that order, and also failed to serve Cohen with "a copy of the Appellant's Opening Brief." Dayco reasoned that Cohen was entitled to notice of the appeal because

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settlement with Dayco. However, as Danpour now acknowledges in his appellate briefing, the settlement agreement expressly states that "[a]ll sums paid by Cohen shall be paid to the obligation due on the Crosspoint Loan," a separate lending agreement between Cohen and Dayco to which Danpour was not a party. Because the agreement allocates all of the settlement proceeds to the Crosspoint loan, and none toward the Avenue K loan that was the subject of Dayco's complaint against Danpour and Cohen, there is no basis for an offset. As discussed in more detail below, although Danpour now argues we should vacate the trial court's good faith settlement order based on the manner in which Cohen and Dayco chose to allocate the settlement proceeds, we dismiss that portion of the appeal.

a reversal of the good faith determination order would effectively nullify the settlement.[10]

In his opposition to the motion, Danpour admitted he had not provided notice of the appeal to Cohen, but contended that if Cohen had "any concern of lack of notice," he was required to raise the objection himself. Danpour further asserted that if notice was necessary, Dayco should provide the "notice . . . to Cohen, who may then seek to file a brief if he chooses. . . ." We deferred the motion to the merits panel.

In its respondent's brief, Dayco reasserted that we should dismiss Danpour's challenge to the good faith settlement order, contending that the "appeal [wa]s without due process to [Cohen]" because Danpour never served Cohen with the opening

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10 Dayco's motion also argued that Code of Civil Procedure section 877.6, subdivision (e), which provides expedited writ review procedures for good faith settlement orders, impliedly precludes review of such order by way of an appeal following entry of a final judgment. There is currently a split of authority regarding this issue. (Compare *Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency* (1999) 73 Cal.App.4th 1130, 1136-1137 [section 877.6, subd. (e) provides exclusive means of obtaining review of good faith settlement order]; *O'Hearn v. Hillcrest Gym and Fitness Center, Inc.* (2004) 115 Cal.App.4th 491, 498-499 [agreeing with *Main Fiber's* conclusion] with *Maryland Casualty Company v. Andreini & Company of Southern California* (2000) 81 Cal.App.4th 1413, 1423 ["section 877.6(e) does not foreclose postjudgment review'"]; *Wilshire Ins. Co. v. Tuff Boy Holding, Inc.* (2001) 86 Cal.App.4th 627 [agreeing with *Maryland Casualty's* analysis and holding].) Because we conclude Danpour's challenge to the good faith settlement order must be dismissed based on his failure to notify Cohen of the appeal, we need not address whether section 877.6, subdivision (e) precludes postjudgment review.

appellate brief, and never notified him of the appeal. Danpour did not address the issue in his reply brief.

California Rule of Court, Rule 8.25 requires that the appellant serve a copy of "any document" filed in the appeal on "the attorney for each party separately represented, on each unrepresented party, and on any other person or entity when required by statute or rule." Although Cohen was a named party in the trial court proceedings, and one of the parties who moved for a determination of good faith settlement, Danpour concedes that he has never attempted to serve Cohen with the opening appellate brief or any other document filed in the appeal.

Danpour's failure to provide Cohen notice of the appellate proceedings is particularly troubling because the remedy he seeks—reversal of the good faith settlement order—would have a clear and direct impact on Cohen's legal rights. The settlement agreement between Dayco and Cohen expressly states that a finding of good faith settlement is a "condition precedent to completing [the] settlement." Thus, a reversal of the trial court's good faith settlement order would effectively nullify the settlement, and revive Dayco's claims against Cohen regarding the Avenue K and Crosspoint loans. It would be fundamentally unfair to reverse the order without ever providing Cohen notice of the appeal, or an opportunity to present his objections thereto. (See generally *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314-315 ["An elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"].)

Despite the arguments that Dayco raised in its motion for partial dismissal, and then reiterated in its respondent's brief, Danpour has still made no effort to serve Cohen with any of the documents he filed in this appeal, or otherwise notify him of the his challenge to the good faith settlement determination.[11] In light of this failure, we strike the portion of Danpour's appellate briefs that challenge the good faith settlement determination order, and dismiss the portion of the appeal seeking review of that order.

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[11] In a supplemental letter brief, Danpour asserts that although he has never served Cohen with any document filed in this appeal, Cohen has nonetheless received actual notice of the appeal through a filing that was served on him in Danpour's federal bankruptcy proceeding. In support, Danpour cites an application he filed in the bankruptcy proceeding that requested authorization to employ a law firm "for the . . . purpose of acting as [Danpour's] appellate counsel regarding [Danpour's] appeal of the judgment entered against him in the California Superior Court in the case *Dayco Funding Corp. v. Henry Danpour*, et al. Case No. BC 476328." According to Danpour, the proof of service on the application shows it was served on Cohen, demonstrating that Cohen did in fact know about the appeal. Although the bankruptcy application references Danpour's appeal of "the judgment," it does not contain any information notifying Cohen that Danpour was seeking review of the good faith settlement determination as part of the appeal. We therefore conclude the application does not provide sufficient notice, and deny Danpour's request that we take judicial notice of the document. (See generally *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 ["only relevant material may be [judicially] noticed. '. . . [J]udicial notice . . . is always confined to those matters which are relevant to the issue at hand'"] [overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257].)

DISPOSITION

The judgment entered in favor of Dayco Funding Corporation is affirmed. The portion of the appeal seeking review of the trial courts' good faith settlement determination order is dismissed. Dayco shall recover its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, J.